

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs February 20, 2008

**SAMUEL PEGUES v. GIL MATHIS, ACTING WARDEN**

**Appeal from the Circuit Court for Davidson County**  
**No. 06C1948     Hamilton Gayden, Judge**

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**No. M2007-01615-CCA-R3-HC - Filed May 14, 2008**

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The Appellant, Samuel Pegues, appeals the Davidson County Circuit Court's summary dismissal of his petition for the writ of habeas corpus. Pegues, currently incarcerated in DeBerry Special Needs Facility in Nashville, was convicted of second degree murder in Madison County Circuit Court and was sentenced to twenty-one and one-half years in confinement. He filed the instant habeas corpus petition alleging: (1) that the convicting court lacked jurisdiction to adjudicate his case because the indictment was insufficient; and (2) that the jury instructions were unconstitutional in that they shifted the burden of proof with regard to voluntary manslaughter. The habeas corpus court summarily dismissed the petition without the appointment of counsel, finding that the judgment of conviction was not void. An order was entered to this effect on May 29, 2007. On July 9, 2007, Pegues filed notice of appeal. On appeal, Pegues first argues that the habeas corpus court erred in finding that the indictment was not defective. With regard to his second issue, Pegues alters his argument on appeal and now contends that he was deprived of a constitutionally complete jury charge by the trial court's omission of the "knowing" element of the crime of second degree murder. Although not raised by either party, we are constrained to note that the notice of appeal in this case was not timely filed. Moreover, "the interest of justice" does not require that the timeliness requirement be waived, as Pegues issues do not warrant relief. Accordingly, the appeal is dismissed.

**Tenn. R. App. P. 3; Appeal Dismissed**

DAVID G. HAYES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and NORMA MCGEE OGLE, JJ., joined.

Samuel Pegues, *pro se*, Nashville, Tennessee.

Robert E. Cooper, Jr., Attorney General and Reporter; and David H. Findley, Assistant Attorney General; for the Appellee, State of Tennessee.

**OPINION**

**Procedural History**

The Appellant was convicted by a Madison County jury of second degree murder and sentenced to twenty-one and one-half years of imprisonment. *Samuel Pegues v. State*, No. W2002-01296-CCA-R3-PC (Tenn. Crim. App. at Jackson, July 29, 2003). The proof of the underlying crime established that the Appellant admitted to shooting his girlfriend after a violent argument. *Id.* A panel of this court affirmed the conviction on direct appeal. *Id.* In 2003, Pegues filed a petition for post-conviction relief alleging ineffective assistance of counsel. *Id.* Relief was denied by the post-conviction court, and a panel of this court affirmed the denial. *Id.*

On July 26, 2006, the Appellant filed a *pro se* petition for the writ of habeas corpus alleging that the trial court lacked jurisdiction because the indictment was insufficient and, further, that the jury instructions were unconstitutional in that they shifted the burden of proof for the lesser-included offense of voluntary manslaughter. The State responded by filing a motion to dismiss, asserting that neither of the Appellant's claims entitled him to habeas corpus relief. The trial court agreed and granted the motion on May 29, 2007. The court entered a subsequent order on June 21, 2007, which taxed the court costs to the Appellant but in no other way amended the May 29th order. The Appellant filed notice of appeal on July 9, 2007.

### Analysis

On appeal, the Appellant contends that the trial court erred in summarily dismissing his petition for writ of habeas corpus and in failing to appoint counsel. Specifically, he asserts that he was deprived of his constitutional right to a correct and complete charge of the law by the trial court's omission of the "knowing" element from the second degree murder charge. Moreover, he maintains that the indictment was insufficient, thus, depriving the trial court of jurisdiction and voiding his second degree murder conviction.

The right to seek habeas corpus relief is guaranteed by Article I, section 15 of the Tennessee Constitution. *Hickman v. State*, 153 S.W.3d 16, 19 (Tenn. 2004). However, the grounds upon which habeas corpus relief will be granted are narrow. *Id.* at 20 (citations omitted). Relief will be granted if the petition establishes that the challenged judgment is void. *Id.* A judgment is void "only when 'it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered' that a convicting court was without jurisdiction or authority to sentence a defendant . . . ." *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993). "If the court rendering a judgment has jurisdiction of the person, the subject-matter, and has the authority to make the challenged judgment, the judgment is voidable, not void; and the judgment may not be collaterally attacked in a suit for habeas corpus relief." *Passarella v. State*, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994); *see also Stephenson v. State*, 28 S.W.3d 910, 911 (Tenn. 2000). A voidable judgment is one that is facially valid and requires proof beyond the face of the record or judgment to establish that it is invalid. *Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999).

The petitioner in a habeas corpus proceeding has the burden of establishing either a void judgment or an illegal confinement by a preponderance of the evidence. If the petitioner carries this burden, he is entitled to immediate release. *Id.* However, if the habeas corpus petition fails to

demonstrate that the judgment is void or that the confinement is illegal, neither appointment of counsel nor an evidentiary hearing is required, and the trial court may properly dismiss the petition. *Hickman*, 153 S.W.3d at 20 (citing T.C.A. § 29-21-109 (2003); *Dixon v. Holland*, 70 S.W.3d 33, 36 (Tenn. 2002)).

Although not raised by the parties in this case, we are constrained to note that review of the record reveals that the Appellant has failed to file a timely notice of appeal in this case. There is no dispute that a habeas corpus petitioner has an appeal as of right from a final judgment entered against him. T.C.A. § 29-21-127 (2006); Tenn. R. App. P. 3(b). The final judgment from which an appeal as of right lies is the order of the habeas corpus court either granting or denying relief. *See William Thompson v. State*, No. M2005-01947-CCA-R3-HC (Tenn. Crim. App. at Nashville, Nov. 1, 2006). In the instant case, the habeas corpus court entered an order summarily dismissing the Appellant's petition on May 29, 2007, which constituted the final judgment in this case. The subsequent order of the court entered on June 21, 2007, which taxed the court costs to the Appellant, had no effect on the disposition of the case and, therefore, is not, for purposes of appeal, the final judgment.

Pursuant to Tenn. R. App. P. 4(a), a notice of appeal "shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from[.]" Thus, the Appellant had thirty days from the entry of the May 29, 2007 order in which to file notice of appeal. As notice of appeal was not filed until July 9, 2007, forty-one days later, it was untimely. However, the untimely filing of a notice of appeal is not always fatal to an appeal. As stated in Rule 4(a), "in all criminal cases the 'notice of appeal' document is not jurisdictional and the filing of such document may be waived in the interest of justice." Tenn. R. App. P. 4(a). "In determining whether waiver is appropriate, this Court will consider the nature of the issues presented for review, the reasons for and the length of the delay in seeking relief, and any other relevant factors presented in the particular case." *State v. Markettus L. Broylde*, No. M2005-00299-CCA-R3-CO (Tenn. Crim. App. at Nashville, Dec. 27, 2005). Waiver is not automatic and should only occur when "the interest of justice" supports waiver. *State v. Scales*, 767 S.W.2d 157, 158 (Tenn. 1989). If this court were to summarily grant a waiver whenever confronted with untimely notices, the thirty-day requirement of Tenn. R. App. P. 4(a) would be rendered a legal fiction. *Michelle Pierre Hill v. State*, No. 01C01-9506-CC-00175 (Tenn. Crim. App. at Nashville, Feb. 13, 1996).

After a review of the record, we conclude that waiver is not required "in the interest of justice." As noted, the issue is not addressed by either party in the case, thus, there is no explanation given by the Appellant for his failure to comply with the requirements of the rule. Moreover, as noted by the State in their argument and found by the habeas corpus court, the issues raised by the Appellant in his petition do not entitle him to relief. His claim regarding the jury instruction, even if substantiated, would not entitle him to habeas corpus relief, as claims related to the abridgement of constitutional rights must be raised in a post-conviction petition as they merely render judgments voidable. *Summers v. State*, 212 S.W.3d 251, 261 (Tenn. 2007). While an indictment which is so defective that it fails to vest jurisdiction in the trial court may be challenged in a habeas corpus proceeding, the indictment in this case was more than sufficient. *See Wyatt v. State*, 24 S.W.3d 319, 323 (Tenn. 2000); *see also State v. Sledge*, 15 S.W.3d 93, 95 (Tenn. 2000). The language, as

established by the face of the indictment, provided the Appellant notice of the offense charged, adequate basis for the entry of a proper judgment, and suitable protection against double jeopardy. *See State v. Hill*, 954 S.W.2d 725, 727 (Tenn. 1997). An indictment which satisfies the notice requirements is considered sufficient to satisfy both constitutional and statutory requirements. *State v. Hammonds*, 30 S.W.3d 294, 300 (Tenn. 2000). Accordingly, no jurisdictional infirmities are found on the face of the indictment or in the record presented.

### **CONCLUSION**

Based upon the foregoing, because the Appellant's notice of appeal was not timely filed and because "the interest of justice" does not require waiver of the rule, the appeal is dismissed.

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DAVID G. HAYES, JUDGE